This case is peculiarly susceptible to treatment of that kind. The allegations in Ohio's proposed amendment are not as yet formally controverted by Kentucky. We, therefore, treat the new material as admitted. Kentucky asserts, however, that, even assuming the new allegations to be true, no cause of action is stated, for the subject matter of Ohio's proposed amendment is barred as a matter of law.

II

In *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), this Court stated that the boundary between Indiana and Kentucky was the low water mark on the western or northwestern side of the Ohio River. *Handly* was an action for ejectment brought by a plaintiff claiming under a grant from Kentucky against defendants claiming under a grant "from the United States, as being part of Indiana." *Id.*, at 375. The disputed land was a neck south of a channel, or bayou, that had formed north of the main river. When the river was high, the channel filled and cut off the land to the north. When the river was low, the channel was dry in part and the separation did not exist. The resolution of the case turned on whether the land was in Indiana or in Kentucky. Indiana, like Ohio, received its territory from the United States. The Court in *Handly* observed that the question "depends chiefly on the land law of Virginia, and on the cession made by that State to the United States," *id.*, at 376, and concluded that the United States acquired title from Virginia when negotiations during the period from 1781–1784 resulted in Virginia's ceding its lands north and west of the Ohio River to the Federal Government.* Kentucky was received as a State of the

*Recommendation of the Continental Congress, September 6, 1780, 10 W. Hening, Laws of Virginia 562 (1822); Resolution of the General Assembly of Virginia, January 2, 1781, conditioned, among other

consistently adhered to in subsequent decisions of this Court. *Indiana v. Kentucky*, 136 U. S. 479 (1890) (despite Indiana's argument, *id.*, at 496-498, that its boundary was the middle of the river); *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592 (1899);[4] *Nicoulin v. O'Brien*, 245 U. S. 112 (1913). It has been explicitly recognized by the Supreme Court of Ohio in *Booth v. Shephard*, 3 Ohio St. 362, 347-348 (1853), where it was stated with far greater precision than the mere assumption the dictum suggests, *post*, at 654-655, that:

"The construction given to the Virginia deed of cession by the supreme court of the United States, having been thus acquiesced in and acted on by the courts, both of Virginia and Ohio, may be regarded as decisive of the question."

See also *Lessee of McCulloch v. Ales*, 2 Ohio 307, 310 (1826); *Lessee of Blanchard v. Porter*, 11 Ohio 138, 142 (1841).[5] See *Commonwealth v. Garner*, 3 Gratt. 655 (Gen. Court of Va. 1846).

In order to counter this history, Ohio argues that, as it was not a party to the *Handly* case, or to any of the later cases in this Court that reaffirmed *Handly*, it is not bound by the rule there established, which it characterizes as dictum. In particular, Ohio contends that it is free to challenge the conclusion that Virginia, prior to ceding

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[4] "Upon this question of boundary nothing can be added to what was said in the cases cited; and it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River." *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 612 (1899).

[5] There is a possible indication to the contrary in the bridge tax case of *Covington & Cincinnati Bridge Co. v. Meyer*, 21 Ohio St. 217, 237, 239 (1871). The case appears, however, to have been resolved on the taxation of the bridge company's Ohio charter granting permission for the erection of the bridge. See *Sebastian v. Covington & Cincinnati Bridge Co.*, 21 Ohio St. 431 (1871).

the statutes to forgo its claim in favor of the United States for the common good. Accordingly, Ohio contends, the premise of *Handly*—that Virginia had title to the northwest territory prior to ceding it to the United States, or, to say it another way, that it was the common proprietor of lands on both sides of the river—is historically invalid.

We need intimate no view on the merits of Ohio's historical analysis, for the State's long acquiescence in the location of its southern border at the northern edge of the Ohio River, and its persistent failure to assert a claim to the northern half of the river, convince us that it may not raise the middle-of-the-river issue at this very late date. The 1820 decision in *Handly* necessarily placed Ohio on notice that any claim it might assert to half the river would be precluded by the reasoning of that opinion. The Court in *Handly* concluded that the entire border between Indiana and Kentucky was the river's northern edge. Virginia's claim to the territory that is now Indiana arose from the same source as its claim to what is now Ohio. The lands to which Virginia purportedly surrendered title to the United States in 1784 encompassed both Ohio and Indiana.[4] Ohio could not reasonably have believed, after *Handly*, that its claim over the northern half of the Ohio River rested on a footing different from that of Indiana.

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[4] *See Indiana* v. *Kentucky*, 136 U. S. 479, 508 (1890). See also the deed of March 1, 1784, referred to in n. 2, *supra*, from Virginia to the United States. On August 7, 1789, Congress passed "An Act to provide for the Government of the Territory Northwest of the river Ohio." 1 Stat. 50. In 1800, this territory was divided into two separate governments. 2 Stat. 58. And on April 30, 1802, the enabling Act for the admission of Ohio was passed. 2 Stat. 173. The State was formed out of the eastern half of the theretofore divided territory and was "bounded . . . on the south by the Ohio river," *ibid.*; the land in the eastern division not included within the boundaries described for Ohio "is hereby attached to, and made a part of the Indiana territory." *Id.*, at 174.

of this Court are too close to support that claim. Ohio recognized this in its initial brief here.[9] Nor, in the light of the long-standing and unequivocal claims of Kentucky over the river, and Ohio's failure to oppose those claims, may Ohio credibly suggest that it has not acquiesced. "The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1926). To like effect are *Vermont* v. *New Hampshire*, 289 U. S. 593, 613 (1933); *Maryland* v. *West Virginia*, 217 U. S. 1, 42–44 (1910); *Louisiana* v. *Mississippi*, 202 U. S. 1, 53–54 (1906); *Virginia* v. *Tennessee*, 148 U. S. 503, 523 (1893); *Indiana* v. *Kentucky*, 136 U. S., at 509–510, 518; *Rhode Island* v. *Massachusetts*, 4 How. 591, 639 (1840)."[10]

Here we have not only long acquiescence by Ohio in Kentucky's open claims over the river, but also lines of cases by this Court and the courts of both Ohio and Kentucky that, for more than 150 years, placed Ohio on consistent notice of the inadequacy of the claim it now asserts. We find ourselves in agreement with the Special Master that Ohio is foreclosed from claiming that its

[9] "Like Ohio, the State of Indiana was formed from the land ceded by Virginia; therefore, it has for its southern boundary the Ohio River. See 3 Stat. 289 (1816), and 3 Stat. 399 (1816). Thus, a determination of the boundary between the states of Indiana and Kentucky would control the determination of the boundary between the states of Ohio and Kentucky." Brief in support of motion for leave to file complaint 10.

[10] The situation, of course, is otherwise when the States' boundary dispute has been open, continuous and of long standing. See, for example, *New Jersey* v. *Delaware*, 291 U. S. 361, 376–377 (1934); *Oklahoma* v. *Texas*, 272 U. S. 21, 46–47 (1926); *Arkansas* v. *Tennessee*, 246 U. S. 158, 170 (1918).

pined by a demurrer. The majority's conclusion of indefiniteness is, therefore, not sustainable.

The Court's decision is a determination upon the merits of Ohio's pretrial allegations and should be made only after all the evidence is before it. The Master concludes, and the Court agrees, that Ohio has acquiesced to Kentucky's ownership of the northern half of the Ohio River as established by adjudications in this Court. Although I find such consideration of the merits to be premature, the Court's reasoning prompts me to review the case law upon which estoppel is urged.

The Ohio River serves as the boundary between the States of Kentucky and Indiana as well as the boundary between the parties to this suit, Kentucky and Ohio. During the 19th century, this Court dealt with the nature of the Kentucky-Indiana boundary in two cases. *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), and *Indiana* v. *Kentucky*, 136 U. S. 479 (1890). Later cases dealt with issues that turned upon the boundary de-

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events, including the reservation of the charter in 1624 when Virginia became a Crown colony, 1 J. Marshall, The Life of George Washington 90; 3 W. Hening's Stat. at Large 536–626; 1 Laws of the United States 465 (D. & D. ed. 1815) (hereinafter Laws), and the ceding by the French to the British of the Eastern Mississippi Valley north of the Ohio River under the Treaty of Paris in 1763, 1 Laws 441–442; A. Shortt & A. Doughty, Documents Relating to the Constitutional History of Canada, 1759–1791, pp. 113, 116, sharply curtailed Virginia's reach and that the middle of the river was intended as the boundary between old and new States by the United States following the Revolution. It seeks to substantiate this final point by reference to various laws that prescribe the boundaries of new States; 1 Laws 475, 480, provide for navigational rights, id., at 479–480, and speak in general terms of Virginia, Kentucky, and Tennessee as the lands south, or north and east, of the Ohio River, and of Ohio, Indiana, and Illinois as the lands to the north, or the north and west, 2 Laws 14, 104, 138, 179, 311, 421, 533; 3 Laws 367, 385, 396, 403, 412.

made clear by the language of these cases." The most recent of the three, indeed, states quite explicitly:

> "It does not become necessary, in this case, to determine whether the middle of the Ohio River . . . does or does not constitute the boundary line between the states of Virginia and Ohio. For all the purposes of this case, it may be assumed that Virginia was the original, undisputed owner of the territory on both sides of the river, and still retains all that she did not part with by her deed of cession in 1784." [*]

Ohio now wishes to question precisely that assumption. In prematurely judging the issues and preterminating briefing and argument of Ohio's attack on the validity of Virginia's title, the Court does disservice both to the adjudication of this dispute and to the procedural contours of original actions. I would allow Ohio to amend its complaint so that the merits might be reached in due course.

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[*] 2 Ohio, at 310 (discussing only ownership of the land above the water line but below the bank); 11 Ohio, at 139–140 ("The defendant's deed conveys the soil to the *top* of the river bank, and reserves the 'break and slope,' between that point and the river"); [*] 3 Ohio St., at 245–246 (noting that "In the case of *Handly's Lessee* v. *Anthony*, the supreme court of the United States, proceed[ed] on the assumption that Virginia was the original proprietor of both sides of the river . . ." (emphasis added)).